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Before the
Federal Communications Commission
Washington, DC 20554

Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA Services in Kansas and Oklahoma	)	CC Docket No. 00-217

COMMENTS OF
Z-TEL COMMUNICATIONS, INC.
IN RESPONSE TO SOUTHWESTERN BELL'S EX PARTE FILING
OF DECEMBER 27, 2000

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SOUTHWESTERN BELL'S DECEMBER 27, 2000 *EX PARTE* FILING

Z-Tel Communications, Inc. ("Z-Tel"), by its attorneys, hereby submits its comments in response to the Federal Communication Commission's ("FCC" or "Commission") Public Notice (DA 00-2912) in the above-captioned proceeding. The Public Notice invited interested parties to respond to the *ex parte* filing of Southwestern Bell Telephone Company ("Southwestern Bell" or "SWBT") on December 27, 2000. Southwestern Bell's *ex parte* filing in regards to its request to be granted authority to provide in-region, interLATA services in Kansas and Oklahoma, pursuant to section 271 of the Communications Act of 1934, as amended ("Act") contained proposed revisions to its Nonrecurring Charges ("NRCs").

I. INTRODUCTION AND SUMMARY

Z-Tel is a Tampa, Florida-based integrated communications provider that offers bundled packages of local, long distance, and enhanced services to residential customers using the combination of unbundled network elements ("UNEs") known as the UNE Platform, or "UNE-P." As of September 30, 2000, Z-Tel was providing integrated local, long distance, and enhanced services more than 250,000 residential consumers. Z-Tel fully expects to provide service to thousands of additional consumers in every state in which Z-Tel has a meaningful opportunity to compete.

After reviewing the December 27, 2000 *ex parte* filing, Z-Tel continues to be of the opinion that Southwestern Bell has failed to meet the pricing standards of section 252 for UNE-P, as evidenced by the tremendous disparity of rates between Kansas and Oklahoma, as well as between those two states and Texas. Although SWBT's cost of providing UNEs is substantially similar throughout the SWBT five-state region, the rates for identical items vary greatly across Kansas, Oklahoma, and Texas. For example, even though SWBT states that the operations support systems ("OSS") used to support UNE service in Kansas, Oklahoma, and Texas are virtually identical, the proposed OSS-related NRCs vary widely across these states. Similarly, the mix of switches used by SWBT across Kansas, Oklahoma, and Texas to provide retail local exchange service is virtually identical, yet the rates for the unbundled local switching ("ULS") UNE vary substantially across these jurisdictions. As such, the broad range and vast disparity of rates between these "virtually identical" offerings demonstrates that SWBT is not providing UNEs in accordance with the cost-based rate requirements of section 252.

Most importantly, neither the Kansas Corporation Commission ("Kansas Commission") nor the Oklahoma Corporation Commission ("Oklahoma Commission") has conducted a reasonable UNE rate proceeding. The Kansas and Oklahoma Commissions have demonstrated lack of any meaningful commitment to the

Commission's cost-based pricing rules, contrary to the FCC's decision in the *Texas Order*.[1]

To demonstrate that Southwestern Bell's application fails to satisfy section 271, Z-Tel provides an overview of its product offering and mass-market entry strategy and next it demonstrates that Southwestern Bell's modified rates for NRCs remain so excessive that they foreclose mass-market entry and are inconsistent with section 252's cost-based pricing standard.

II. Z-TEL'S PRODUCT OFFERING AND MASS-MARKET ENTRY STRATEGY

Z-Tel's flagship product is known as "Z-Line Home Edition," which consists of a bundled package of local, long distance, and enhanced services, such as voicemail, caller ID, call waiting, "follow me," and Internet features and functions. Z-Tel first began providing a UNE-P-based residential offering in New York during the summer of 1999, and since that time, Z-Tel has entered a number of other states, including Arizona, California, Georgia, Illinois, Michigan, Maryland, Massachusetts, Pennsylvania, Oregon, Texas, Virginia, and Washington. Z-Tel has established test customers in Alabama, Florida and Louisiana. As of September 30, 2000, Z-Tel had more than 250,000 residential customers.

Z-Tel's fundamental business goal is to provide bundled packages of local, long distance, and enhanced services to as many residential customers in as many

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1 *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant To Section 271 Of The Telecommunications Act Of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No 00-65, FCC 00-238, ¶¶ 234-239 (rel. June 30, 2000) ("*Texas Order*").

states as possible. Whether and to what extent Z-Tel enters a state depends on two primary factors: (1) the quality of the OSS provided by the incumbent and (2) the recurring charges and NRCs for UNEs. If the OSS provided by the incumbent can support large volumes of orders and if the rates are reasonable, then Z-Tel will aggressively mass market its Home Edition product to residential customers in that state.

In states in which Z-Tel cannot mass market its residential offering, Z-Tel often establishes a small base of customers to develop practical operational experience with the incumbent. As one example, in Washington, Z-Tel provided service to a limited number of customers, but did not actively market its residential product offering. Qwest's OSS has significant problems, and Qwest's NRC rates in Washington were excessive (*e.g.*, the NRC for migrating a Qwest retail customer to the UNE-P was over $185). Z-Tel is working actively to encourage Qwest to improve its OSS and was successful in negotiating NRCs of $12.41. Once the NRC was lowered, Z-Tel proceeded to actively market its product to residential customers in Washington.

Presently, in spite of some significant pricing issues, Z-Tel is able to market its residential service package aggressively in Southwestern Bell's Texas territory and in some other areas, including Verizon's New York and Pennsylvania territories.[2] In these states, the OSS provided by the incumbent is sufficient to support Z-Tel's mass-market offering.

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[2] Even in these jurisdictions where market entry is reasonable, significant pricing issues exist. For example, the $30.30 UNE-P migration charge in Texas is excessive as compared to other states, and even as compared to recent BOC cost studies. *See*, Ford Declaration filed in this Cause on December 11, 2000 at Table 3 (comparing UNE-P migration charges across a number of states).

Although Z-Tel is poised to enter the Kansas and Oklahoma residential local exchange markets, Z-Tel can't realistically conduct an aggressive marketing campaign in Kansas or Oklahoma because the current NRCs and proposed NRCs for UNE-P-related items are excessive, making it cost-prohibitive to enter these states.[3] Z-Tel would buy the exact same items from Southwestern Bell in Kansas, Oklahoma and Texas, however, the prices of these essentially identical items are so disparate that Z-Tel may not economically be able to market its services in Kansas and Oklahoma.

III. SOUTHWESTERN BELL'S JOINT APPLICATION AND REVISED RATES CONTINUE TO FAIL TO SATISFY CHECKLIST ITEM TWO

Item two of the competitive checklist requires Southwestern Bell to demonstrate that it provides "nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1)" of the Act.[4] Section 252(d)(1) sets the pricing standard of UNEs. To demonstrate compliance with checklist item two, Southwestern Bell relies on its assertion that it has taken the same regulatory steps in the five-state service area that it has taken in Texas.[5] Indeed, "[t]hroughout its five-state service area, SWBT provides access to UNEs under

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3 *See id.* Moreover, substantial uncertainty exists regarding the status of UNE recurring charges and NRCs in Kansas and Oklahoma. In its rate analysis, Z-Tel has relied on the rates included the Kansas 271 Interconnection Agreement (*i.e.*, the "K2A") and the Oklahoma 271 Interconnection Agreement (*i.e.*, the "O2A"), which SWBT proffers as the best available rates, terms, and conditions for interconnection and access to UNEs. Discounts and interim proposals described in SWBT's application, such as the interim "zero NRC" proposal provide no meaningful benefit to competitors, as the underlying state commission-approved rates are excessive, neither state commission has demonstrated a commitment to this Commission's cost-based pricing rules, and many of SWBT's proposals are subject to retroactive true-up.

4 47 U.S.C. § 271(c)(2)(B)(ii).

5 Southwestern Bell Brief at 19.

equivalent terms and conditions, and it offers CLECs access to the same OSS."[6] SWBT asserts that since this Commission found SWBT's performance in Texas consistent with section 271; therefore, the Commission must find that its provision of UNEs and OSS "are sufficient ... in both Kansas and Oklahoma as well."[7]

Although processes and procedures may be the same, the rates charged are vastly disparate for Kansas, Oklahoma, and Texas. While far from perfect, the rates for UNE-P in Texas have made mass-market entry possible,[8] the proposed rates for UNE-P in Kansas and Oklahoma have foreclosed, and will continue to foreclose, mass market competition. Southwestern Bell's proposed UNE-P rates in Kansas and Oklahoma simply do not satisfy the cost-based pricing standard of section 252(d)(1), nor do they comply with the Commission's cost-based pricing rules. Z-Tel concurs with Department of Justice ("DOJ") that the FCC should independently determine whether SWBT's rates in Kansas and Oklahoma are properly cost-based.[9]

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6 *Id.*

7 *Id.*

8 As noted previously, Z-Tel believes that the current $30.30 migration NRC in Texas is excessive. In Michigan, an affiliated jurisdiction, the NRC for an identical UNE-P migration is only $0.35, and BellSouth, in its recent cost filings, has proposed a UNE-P migration charge of only $0.20. *See* Ford Declaration at Table 3.

9 DOJ Kansas/Oklahoma Evaluation at 10.

A. Southwestern Bell's Rates In Kansas And Oklahoma Do Not Satisfy The Cost-Based Pricing Prong Of Checklist Item Two

The pricing prong of checklist item two requires a BOC to demonstrate that it provides UNEs in accordance with section 252(d)(1) of the Act.[10] Pursuant to section 252(d)(1), determinations by a state commission of just and reasonable rates for network elements must be "based on the cost ... of providing ... the network element ... and nondiscriminatory [] and may include a reasonable profit."[11] In the section 271 context, "a BOC must show that its prices for interconnection and unbundled network elements are based on forward-looking, long-run incremental costs" in order to demonstrate compliance with checklist item two.[12] Southwestern Bell's proposed NRCs fail to satisfy the cost-based pricing standard of section 252(d)(1).

1. Although the services and service quality provided by Southwestern Bell are essentially identical, the rates in Kansas and Oklahoma are materially higher than in Texas

Southwestern Bell relies heavily on the validity of its Texas application to support its joint application to provide in-region, interLATA services in Kansas and Oklahoma.[13] Although the process, procedures, and OSS used by Southwestern Bell in Kansas and Oklahoma may be "materially indistinguishable" from those in Texas, the rates for these "carbon copies" are materially and substantially higher. So much higher,

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10 47 U.S.C. § 271(c)(2)(B)(ii).

11 47 U.S.C. § 252(d)(1).

12 *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶237 (1999)("*New York Order*"), *aff'd*, *AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

13 *See, e.g.*, Southwestern Bell Brief at 18-19.

in fact, that Z-Tel cannot mass market its residential product offering in Kansas and Oklahoma. In Z-Tel's view, Southwestern Bell's reliance on Texas must run both ways. Just as Southwestern Bell's Texas performance supports a presumption that Southwestern Bell is providing the UNE-P in accordance with checklist item two, Southwestern Bell's Texas rates support a presumption that the rates in Kansas and Oklahoma for the UNE-P are inconsistent with checklist item two.

The UNE charges in the five-state region that Southwestern Bell serves are expected to vary minimally from state to state.[14] However, when comparing the proposed NRCs across Kansas, Oklahoma, and Texas, for example, rate disparities are striking. Indeed, for some services the cost in Oklahoma is 13 times greater than that for the same service, by the same company, utilizing the same OSS in Texas.[15] Southwestern Bell's application makes no assertion that its forward-looking cost of providing NRCs is any different in Kansas, Oklahoma, or Texas. Southwestern Bell has not done so, and cannot do so, because Southwestern Bell acts as a single entity when it borrows money, buys equipment, and deploys computer systems, such as the "carbon copy" OSS available in Kansas, Oklahoma, and Texas.

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14 Order Regarding Non-Recurring Charges for Unbundled Network Elements, *In the Matter of the Application of Sprint Communications Company, L.P., United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas, and United Telephone Company of Southeastern Kansas for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. 97-SCCC-149-GIT, November 3, 2000 (Attach. 12 to KCC 271 Report) ("*KCC NRC Order*") at 2.

15 DOJ Kansas/Oklahoma Evaluation at 16. *See also*, Ford Declaration.

Z-Tel has reviewed the *ex parte* filing and believes that the proposed NRCs for a UNE-P migration in Oklahoma is $47.89 and in Kansas, a charge of $45.44 is proposed. These proposed charges are more than 50 percent higher than the $30.30 Texas rate. This disparity becomes even more evident when looking at the components of the NRCs. For example, the Loop NRC in Kansas is $30.75, but only $24.38 in Oklahoma. Even worse, the Oklahoma rate for port features is $3.20 per feature. In Kansas, the NRC is $0.05 per feature. Thus, the features NRC in Oklahoma is 65 times that in Kansas. Though not related to UNE-P, it is worth noting that the "New Complex" service order charge in Oklahoma is 537% higher than in Kansas ($95.55/$15.00). Such a wide disparity in NRCs cannot be explained by cost differences when, as Southwestern Bell claims, "SWBT's LSC operates on a five-state regional basis. SWBT utilizes the same LSC facilities and personnel for all states in SWBT's five-state area".[16] (). Because NRCs are simply work times (which should not vary considerably by state) multiplied by the labor rate (which should be equal since Southwestern Bell's LSCs serve all states), Southwestern Bell's claim that its NRCs are cost-based is untenable.

In fact, Southwestern Bell puts forth only a weak argument that its rates are cost-based. Instead, Southwestern Bell attempts to justify the dramatic differences in NRCs as "different interpretations" of the TELRIC standard. [17] The fact that the state commissions of Texas, Oklahoma and Kansas have different interpretations of the TELRIC standard does not imply that all such interpretations are valid. The TELRIC standard is not a mere vessel into which meaning must be poured [borrowing the phrase from *Farmers Union Central Exchange, Inc., v. FERC*, 734 F. 2d 1486, 1504 (D.C. Cir.

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16 Smith Reply Affidavit, p. 2

1984) regarding the "just and reasonable" standard]. Without question, the wildly disparate NRCs across Oklahoma and Kansas, two states more similar than not as illustrated in Figure 1, fall well outside the "zone of reasonableness." Southwestern Bell's "interpretational differences" explanation is unsatisfactory.

Further, Southwestern Bell's witnesses, Ries and Smith state that "[I]n many cases, the resulting costs cannot be mapped to the ordered rates because the state commissions then made further downward adjustments that were not explained."[18] One must wonder how Southwestern Bell can assert that its rates are based upon TELRIC when there are elements of the rates that "were not explained"[19] Is Southwestern Bell simply presuming, without knowing the details of the state commission's calculations, that the commission based its decision on TELRIC principle(s)? There is not a shred of evidence in the record to support that the mysterious adjustments are compatible with the TELRIC standard. Second, as a legal matter, regulatory agencies must make clear the "basic data and the 'whys and wherefores' of [their] conclusions."[20] Even if the TELRIC standard justifies the 'unexplained adjustments,' such adjustments are arbitrary and capricious without explanation.

Apparently, Southwestern Bell believes that by offering lower NRCs the fact that many other of Southwestern Bell's UNE rates are not cost-based will be masked. For instance, UNE switching rates remain substantially above costs. Tandem switching rates in Oklahoma and Kansas are still 5000% and 4000% greater than in Texas. End-

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17 *See* Reply of Reis and Smith, ¶48.

18 Reply of Reis and Smith, ¶46.

19 *See id.*

20 City of Holyoke Gas & Electric Dept. v. FERC, 954 F.2d 740, 743 (D.C. Cir. 1992).

office switching rates in Oklahoma remain 74% higher than in Texas and 70% higher than in Kansas. A most peculiar discovery is found in the deaveraged ULS rates in OK and KS: the Urban ULS rate in Oklahoma is virtually identical to the Rural rate in Kansas (0.002268 OK/Urban to 0.00253 KS/Rural; less than a 2% difference). The rates for blended transport are equally troubling. The blended transport rate in Kansas exceeds the Texas rate by more than 600%, and the Oklahoma blended transport rate exceeds the Kansas rate by roughly two times. In addition, analog line ports are (on average) 44% higher in Oklahoma than in Kansas. Switching equipment is scaleable, and the prices of switching equipment should not vary considerably by state. There can be no justification for such wide disparities in tandem switching rates particularly when considering the similarities between Oklahoma and Kansas in terms of line count and density distribution.

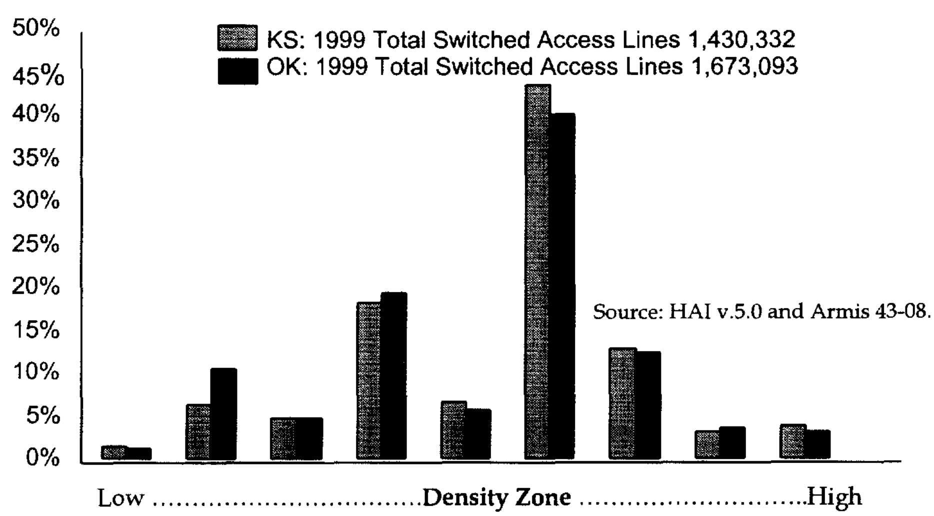

Figure 1. Lines and Density in Oklahoma and Kansas

The Commission should not let Southwestern Bell have it both ways. Until the rates for materially-similar services are priced similarly and the excessively high NRC rates are addressed, the Commission should deny Southwestern Bell's Application to provide in-region, interLATA services in Kansas and Oklahoma.

2. The Kansas and Oklahoma Commissions failed to conduct a reasonable UNE cost analysis and to demonstrate a "commitment to TELRIC," consistent with the *New York* and *Texas Orders*

As noted in the *New York Order*, the Commission will reject an application on pricing grounds "only if basic TELRIC principles are violated or the state commission makes clear errors in factual finding on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[21] Similarly, in the *Texas Order*, the Commission declined to take action on numerous SWBT rates on grounds that those rates were interim and the Texas Commission was in the process of conducting a rate case.[22] There, the Commission felt secure in supporting interim rates because the Texas Commission had "demonstrated its commitment to [the FCC's] pricing rules, and provision is made for refunds or true-ups once permanent rates are set."[23]

SWBT's proposed rates in Kansas and Oklahoma are neither reasonable, nor in keeping with the Commission's cost-based rate standards. In keeping with the Commission's position in the *New York* and *Texas Orders*, the state commissions' failure to conduct an adequate analysis of UNE rates, or compliance with cost-based pricing,

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21 *New York Order* at ¶ 244 (1999).

22 *See Texas Order, at* ¶¶ 234-239; *see also, New York Order*, ¶ 259.

creates a *de facto* obligation on the part of the Commission to make an independent determination of reasonable UNE rates. The fact that Southwestern Bell has now voluntarily agreed to lower its Kansas and Oklahoma NRCs provide further evidence that the rates established in Kansas and Oklahoma were unreasonable.

For these reasons, the Commission may – and should – act to ensure that Southwestern Bell is providing UNEs at rates consistent with TELRIC prior to any grant of section 271 authority in Kansas or Oklahoma. Any other result would sanction Southwestern Bell's entry into the in-region, interLATA markets before the Kansas and Oklahoma local exchange mass markets are irreversibly open to competition.

IV. CONCLUSION

For the forgoing reasons, the Commission should reject Southwestern Bell's Joint Application.

Respectfully submitted,

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Dated: January 8, 2001

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[23] *Texas Order*, ¶ 236.

CERTIFICATE OF SERVICE

I, Charles M. Hines III, hereby certify that a true and correct copy of the foregoing **"Comments of Z-Tel Communications, Inc.; CC Docket No. 00-217"** was delivered by courier service and first class mail this 8th day of January, 2001 to the individuals on the following list:

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